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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE, Plaintiff and Respondent, v. KESHAN KASIN MITCHELL, Defendant and Appellant.	C045530 (Super. Ct. No. CRF01162)

A jury convicted defendant Keshan Kasin Mitchell of second degree murder with personal use of a firearm (Pen. Code, §§ 187, subd. (a), 12022.5, subd. (a), 12022.53, subds. (b)-(d); further section references are to this code unless otherwise specified), possession of a firearm by a convicted felon (§ 12021.1, subd. (a)), first degree burglary (§ 459), and vehicle theft (Veh. Code, § 10851, subd. (a)). In bifurcated proceedings, the trial court found that defendant had a prior serious felony conviction within the meaning of the "three strikes law" (§§ 667, subds. (b)-(i),

1170.12). Defendant was sentenced to a lengthy term in state prison.

On appeal, defendant contends (1) he received ineffective assistance of counsel, (2) the trial court erred in refusing an instruction requested by the defense, and (3) the court committed sentencing error. We shall modify the judgment to provide for presentence custody credit and shall affirm the judgment as modified.

FACTS

On March 17, 2001, defendant attended a party held at Brandon Clark's house. Those attending the party were drinking alcohol and smoking marijuana.

Rusty Padgett, who rented a room in Clark's house, had seen defendant at the house on prior occasions. A week earlier, defendant tried to sell a gun there. Another time, he was there "racking off the rounds" of a gun by "cocking shells out of it." According to Clark, defendant had tried to sell drugs at the house in the past.

Padgett testified that around midnight, several people were in his room, including defendant, Padgett, Clark, Timothy Demastes, Richard Albert, Jared Soccey, and Dave Rob. Padgett saw defendant talking to Demastes, whom defendant had in a corner, against the wall. When defendant poked his finger in Demastes's chest, Demastes said, "'[G]et out of my face.'" Defendant asked, "'What, do you think I'm gay?'" Demastes answered, "'No. I just don't like you up in my face.'" Defendant poked Demastes "a couple of more times" and asked Demastes if he was a racist. Demastes said

no and denied that he did not like defendant because he is Black. When Demastes started to walk away, defendant pulled out a .45-caliber handgun and shot him in the chest.

Soccey testified that he saw defendant "poking" and "pushing" Demastes, who then walked away. Hearing "a couple people gasp," Soccey looked up and saw defendant pointing a gun at Demastes's chest. Demastes put his hands up in the air, but defendant shot him.

According to Albert, "some controversy came up" in the "conversation about racists" amongst Albert, Demastes, Padgett, Soccey, and defendant. Albert testified that when Demastes headed for the door, defendant "spun" him around and asked if he was a racist. Demastes responded, "'No, I don't hate any color in particular, but I do hate certain people.'" When defendant said, "'I'll kill you, Honky,'" Demastes replied, "'Go ahead and try.'" Defendant then pulled out a gun and shot Demastes.

Clark testified that he heard defendant and Demastes "arguing" face-to-face for a "[c]ouple seconds." Demastes then put his hands up and walked away toward the door. When Demastes turned around, defendant had a gun to his chest. Demastes again put his hands up, palms out. But defendant shot him anyway.

Witnesses testified that Demastes fell, blocking the only exit from the bedroom. Defendant waived the gun around and ordered the others to move Demastes. When they did so, defendant ran out of the house, passing by Herd. Defendant threatened to shoot Herd if he did not get out of the way.

Demastes died from the single gunshot wound from a .45-caliber handgun. A .45-caliber shell casing was found in the bedroom, and a knife was found on the bed. Albert, Soccey, and Clark denied that Demastes had threatened defendant with a knife or otherwise. Soccey explained that he had grabbed a knife from the stereo in the bedroom after defendant left. Soccey took it out of its sheath in order to defend himself if defendant returned. A fingerprint on the tip of the blade matched a fingerprint of Dave Rob.

Nicole Fox testified that defendant arrived at the party and started to confront people about racism, asking Demastes and Padgett if they were white soldiers, which meant racists to her. Demastes said no and tried to ignore defendant. Fox believed that defendant was "trying to start trouble going around asking people [about racism]."

Officer Anthony Duncan testified that when he interviewed Padgett on the night of the shooting, Padgett said that defendant called him a "white soldier" and Demastes "took offense to this," saying that he was a "white soldier," too.

At trial, Padgett denied there had been a discussion about a "soldier" or a "white soldier" on the night of the shooting, but said that defendant had called Padgett and others soldiers in the past. Padgett testified that he thought defendant was referring to the rap group, Soldier. According to Padgett, he was not a member of a racist organization, he had never heard the term "white soldier," and he had relatives and a "lot of friends" of different ethnicities.

Clark testified that he never heard Padgett describe himself as a white soldier. As to bias against minorities, Clark testified that he had rented a room to an African-American and that he had dated a Filipino/African-American woman.

Soccey testified that he did not hear anyone say the words "white soldier" on the night of the shooting and that he had never described himself as a "white soldier." Soccey thought it was a "[p]rison gang term." He denied having any "racist ideas" and said that he had "quite a few relatives in LA who are all African-American."

Albert testified that he did not hear anyone say anything about a "white soldier" that night, nor did he hear Demastes refer to himself as "'100 percent soldier.'"[1] According to Albert, he heard defendant say something about being a soldier. Albert thought that this meant someone firm in his beliefs and that it was possibly a gang term related to white supremacy, as used in rap music that he had heard.

Several hours after the shooting, Winona and Charles Miller were sleeping in their home. Winona awoke around 4:00 a.m., headed to the bedroom, and encountered defendant. She fell to the floor and yelled for Charles to get his gun because there was an intruder in the house. Defendant fled, taking the Millers' truck and some money. An investigation revealed that

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[1] Officer Randall Elliott, who interviewed Albert after the shooting, testified Albert said Demastes told defendant that Demastes was "'100 percent white soldier.'"

the garage door had been forced open. Defendant's fingerprint was found on a glass paperweight on top of the washing machine in the garage. The paperweight had been in the front room.

Defendant did not testify.

DISCUSSION

I

Defendant contends he received ineffective assistance of counsel because his trial attorney failed (1) to investigate and present a mental defense, (2) to arrange for a psychiatric evaluation of defendant, (3) to call "an expert to testify at trial regarding mental disorders, such as posttraumatic stress syndrome, which [defendant] may have been suffering from," (4) to prepare "special instructions regarding possible cultural/mental defenses which would have supported a lesser verdict of manslaughter," and (5) to request pinpoint instructions on imperfect self-defense.

According to defendant, "[g]iven [his] personal history and the circumstances of this offense," he "may have been suffering from one or more mental disorders such as posttraumatic stress syndrome," or "acute stress disorder, which is the development of 'characteristic anxiety,'" or "some type of adjustment disorder, which is the development of clinically significant emotional or behavioral symptoms in response to an identifiable psychosocial stressor." In defendant's view, "[a]ny one of those mental disorders would have been relevant to determining [his] state of mind at the time of the shooting."

Defendant supports this claim by referring to the probation report, which reflects that his father's whereabouts were unknown, his mother was in prison, and defendant was a high school dropout, an "alcoholic," a drug abuser [he claimed he stopped drinking and abusing drugs in 1997], and a convicted violent offender [he shot his stepfather who allegedly was physically abusing his mother]. Defendant argues that while these circumstances "may not directly prove [his] defenses on appeal," they "show that defense counsel should have been on notice regarding potentially meritorious defenses which should have been adequately investigated and presented to the jury."

Defendant also complains that his trial attorney failed to request CALJIC No. 5.17, on imperfect self-defense, based on the possibility that he may have "overacted [*sic*] to [a] perceived threat" of "imminent attack" when he "found himself in a bedroom with a group of strangers; one of [whom] was a white supremacist and there were weapons available in the room for [Demastes] to use."

To establish ineffective assistance of counsel, defendant must show that his trial attorney's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 689, 691-692 [80 L.Ed.2d 674, 693, 694, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) In order to demonstrate that counsel failed to investigate the case adequately, defendant must produce the evidence that further investigation would have shown. A claim unsupported by evidence is insufficient to determine whether it is reasonably probable

that defendant would have obtained a more favorable result with adequate investigation. (See *People v. McDermott* (2002) 28 Cal.4th 946, 992; *In re Marquez* (1992) 1 Cal.4th 584, 603-609; *In re Fields* (1990) 51 Cal.3d 1063, 1071.) And, where the record on appeal fails to reflect why counsel acted or failed to act, we must affirm the judgment unless there could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Defendant's claim of ineffective assistance of counsel is based primarily upon his speculative assertion that he may have a mental disorder. But the probation report, upon which he relies, suggests no such thing. Thus, his claim is insufficient. (*In re Fields, supra,* 51 Cal.3d at p. 1071.)

Although defendant also bases his claim in part upon counsel's failure to request the appointment of an expert, the record does not reflect what investigation counsel conducted; thus, we are unable to evaluate counsel's performance. Hence, we must affirm the judgment because this claim of error is "more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello, supra,* 15 Cal.4th at pp. 266-267; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

With respect to defendant's claim that his trial attorney was ineffective for failing to request instructions on "possible cultural/mental defenses" and pinpoint instructions on imperfect self-defense, the record does not support such instructions. Defendant did not testify, and there was no other evidence from which to infer that defendant had an actual but unreasonable belief

that he needed to defend himself. Rather, the evidence establishes that Demastes posed no threat to defendant when defendant shot him. Defense counsel cannot be faulted for failing to make a futile request for instructions unsupported by the evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1222; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1400.)

II

Defendant claims that with respect to instructions on the lesser included offense of voluntary manslaughter based on the theory of heat of passion, the trial court erroneously refused to give a defense-requested instruction, CALJIC No. 8.44. That instruction would have told the jury: "Neither fear, revenge, nor the emotion induced by and accompanying or following an intent to commit a felony, nor any or all of these emotional states, in and of themselves, constitute the heat of passion referred to in the law of manslaughter. Any or all of these emotions may be involved in a heat of passion that causes judgment to give way to impulse and rashness. Also, any one or more of them may exist in the mind of a person who acts deliberately and from choice, whether the choice is reasonable or unreasonable."

In refusing the instruction, the trial judge reiterated that as "indicated earlier I was not going to give it. I have read it 15 times last night to see how it made any sense or would be of any benefit to this jury under these sets of facts. It made no sense to me. No matter how many times I read it, I can't see how it would help the jury, and it is refused."

In reviewing a claim of instructional error, we consider the instructions as a whole and assume that the jurors are capable of understanding and correlating all the instructions. (*People v. Haskett* (1990) 52 Cal.3d 210, 235; *People v. Laws* (1993) 12 Cal.App.4th 786, 796.)

The jury was instructed on the charged offense of murder, as well as manslaughter, including CALJIC Nos. 8.00 [homicide--defined], 8.10 [murder--defined], 8.11 [malice aforethought--defined], 8.30 [unpremeditated murder of the second degree], 8.31 [second degree murder--killing resulting from unlawful act dangerous to life], 8.37 [manslaughter--defined], 8.40 [voluntary manslaughter--defined], 8.42 [sudden quarrel or heat of passion and provocation explained], 8.50 [murder and manslaughter distinguished].

In considering a defendant's claim of provocation, the jury must evaluate the character and degree of provocation, the effect of provocation on the defendant's ability to reason and consider his actions, and whether there was a sufficient cooling off period for the passion to subside and reason to be restored. (See, e.g., CALJIC Nos. 8.42 [sudden quarrel or heat of passion and provocation explained], 8.43 [murder or manslaughter--cooling period] and 8.44 [no specific emotion alone constitutes heat of passion].)

As we have noted, the trial court instructed in the language of CALJIC No. 8.42. Defense counsel understandably did not request CALJIC No. 8.43, and the trial court refused to give CALJIC No. 8.44.

In opening argument, the prosecutor asserted that defendant felt "comfortable" partying at Clark's house, that a "little" argument ensued in Padgett's bedroom, but that it was not the type of argument to reduce the killing to manslaughter, i.e., "[i]t is not the kind where you walk into your house and you see your spouse in bed with somebody else and you lose it[,] [y]ou grab something, a gun, something, you kill them."

Defense counsel argued only that passions had been aroused and that there had been a sudden quarrel about racism, white supremacy, or possibly sexual orientation, sufficient to reduce the killing to manslaughter.

In closing, the prosecutor argued that an ordinary, reasonable person would not have acted in the manner defendant did under the circumstances. The prosecution did not challenge which emotional state may have been involved.

Consequently, the instructions given, CALJIC Nos. 8.40 and 8.42, were sufficient to inform the jury that adequate provocation would reduce an unlawful killing from murder to manslaughter. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1015 [when the court chooses to instruct on a particular legal issue, it must do so correctly].) And as the trial judge correctly observed, CALJIC No. 8.44 did not apply because there was no evidence that defendant's emotional state was "induced by" an intent to commit a felony.

Nevertheless, defendant argues that in requesting CALJIC No. 8.44, his trial attorney "should have at least deleted the phrase 'following an intent to commit a felony,' as that phrase

by itself was not necessary." Even assuming for purposes of discussion that the instruction would have been proper if so revised, defendant cannot show that he was prejudiced by the lack of such an instruction.

This is so because the jury was correctly told that "heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his][her] own standard of conduct and to justify or excuse [himself][herself] because [his][her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him][her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation." (CALJIC No. 8.42.)

Here, the evidence showed it was defendant who was trying to "start trouble" as soon as he arrived at the party, by confronting others about racism. And it was defendant who confronted the victim, Demastes, and began poking him in the chest. When the victim denied being a racist and asked defendant to "get out of [his] face," it was defendant who brought up the subject of sexual orientation. Then, as the victim held up his hands and tried to walk away, it was defendant who pulled out a gun and shot the victim. A reasonable person in defendant's position would not have reacted in the manner that defendant did. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1086.) Thus, heat of passion did not apply, and defendant could not have benefited from a revised version of CALJIC No. 8.44.

III

When defendant was sentenced on the crimes and enhancements in this case, he was resentenced on nine felony counts from his earlier convictions in Riverside County. (§ 1170.1.)

When sentenced in Riverside County, defendant was awarded 767 days of custody credits and 115 days of conduct credits days (§ 2933.1) for a total of 882 days of presentence custody credits. In resentencing on the Riverside County convictions, the trial court here refused to award the presentence custody credits previously awarded by the sentencing court in Riverside County. The trial court believed that "under the rules of C.D.C., [the Department of Corrections] will deal with those credits."

Defendant contends the trial court had "no legal authority to deny [him] the credits he was legally given by the Riverside County judge." The People "do[] not dispute that [defendant] is entitled to the presentence custody credits that he was awarded by Riverside County," citing *People v. Bozeman* (1984) 152 Cal.App.3d 504, 506, but "counter[] that the Yuba County Court's resentencing did not impact the credits already awarded to [him]."

According to the People, "a portion of the original abstract with its sentence credit award and fine and restitution orders is still in effect" and "it does not make sense for the Yuba County Superior Court to recalculate [defendant's] presentence custody award from Riverside County because the Yuba County Superior Court was not in possession of any information concerning [defendant's] work or good behavior." We disagree.

When the trial court modified defendant's Riverside County sentence, it "should have determined all actual days defendant had spent in custody, whether in jail or prison, and awarded such credits in the *new* abstract of judgment." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 40-41, emphasis added.) Thus, the trial court was required to order the presentence custody credit previously awarded by Riverside County when he was sentenced there on May 30, 2003.

And the trial court was required to give defendant credit for the number of actual days of presentence custody in the Yuba County jail on the charges in this case. However, because defendant was serving a prison sentence while he was in the county jail during the prosecution of this case from July 24, 2003, until he was sentenced on November 17, 2003, it was the responsibility of the Department of Corrections to calculate conduct credits as to the time defendant spent in the Yuba County jail. (*In re Martinez* (2003) 30 Cal.4th 29, 37; *Buckhalter, supra,* 26 Cal.4th at pp. 33-34, 40-41.)

DISPOSITION

The judgment is modified to award defendant presentence credits of 882 days in Riverside County case No. R1F095799 and actual custody credit for time defendant was housed in the Yolo County Jail. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and to forward a certified copy of the amended abstract to the Department of Corrections.

SCOTLAND, P.J.

We concur:

MORRISON, J.

HULL, J.